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No. 97-5737

Supreme Court, U.S.
FILED
MAR 27 1998
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

SANDRA K. FORNEY,
Petitioner,

v.

KENNETH S. APFEL,
COMMISSIONER OF SOCIAL SECURITY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF AMICUS CURIAE IN SUPPORT OF THE JUDGMENT BELOW

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(Amicus Curiae, invited by Court, per Order of January 26, 1998)
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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

45 pp

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QUESTION PRESENTED

Whether a social security claimant who succeeds in winning a district court judgment pursuant to 42 U.S.C. § 405(g), setting aside an agency decision to deny benefits and remanding to give the claimant an opportunity to secure all of the benefits she seeks, is entitled to bring an appeal seeking reversal of the agency decision for additional reasons not relied upon by the district court in entering judgment in the claimant's favor.

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BRIEF OF AMICUS CURIAE IN SUPPORT OF THE JUDGMENT BELOW

INTEREST OF AMICUS CURIAE

On January 26, 1998, this Court invited Allen R. Snyder to brief and argue this case, as amicus curiae, in support of the judgment below. 118 S. Ct. 902. This brief is submitted in accordance with the Court's order.

INTRODUCTION

The Social Security Act vests primary responsibility for distributing benefits in the executive agency charged with administering the program (the Social Security Administration, or SSA), but gives claimants the right to challenge adverse, final agency decisions in federal court.

See 42 U.S.C. § 405(g).[1] A district court entertaining such a challenge has the "power to enter * * * a judgment affirming, modifying, or reversing the decision of the Commissioner of [SSA], with or without remanding the cause for a rehearing." *Id.* "The judgment of the court [is] final except that it [is] subject to review in the same manner as a judgment in other civil actions." *Id.* The question presented is whether a claimant who wins a favorable district court judgment pursuant to Section 405(g), setting aside the Commissioner's decision to deny benefits and remanding to give the claimant another opportunity to secure the claimed benefits, is entitled to appeal on the ground that the Commissioner's decision is erroneous for additional or alternative reasons.

In *Sullivan* v. *Finklestein*, 496 U.S. 617, 624-625 (1990), this Court held that the Secretary of Health and Human Services[2] was entitled to appeal a district court judgment entered pursuant to Section 405(g), where the judgment set aside the agency decision to deny benefits and remanded for further consideration of that issue. Recognizing that "[t]here is, of course, a great variety in remands, reflecting in turn the variety of ways in which agency action may be challenged in the district courts and the possible outcomes of such challenges," the Court expressly limited its holding to the particular circumstances in *Finklestein*. *Id.* at 623 & n.3. Of particular importance was the fact that, if the Secretary were not permitted to bring an immediate appeal, the agency likely would be denied any opportunity to challenge the district court judgment—which "essentially invalidated * * * [agency] regu-

[1] Section 405(g) is reproduced in the addendum hereto.

[2] In 1994 Congress transferred the administration of the social security program from the Secretary of Health and Human Services to the Commissioner of SSA. *See* Social Security Independence and Program Improvements Act of 1994, Pub. L. No. 103-296, § 106(d), 108 Stat. 1476.

lations," *id.* at 624—in the event the claimant prevailed on remand. *Id.* at 625.

This case is a variant of *Finklestein*, but with the relevant procedural circumstances turned essentially inside out. The appellant in this case is the disability claimant, not the agency, and, quite unlike the Secretary in *Finklestein*, the appellant here *won* in the District Court. As she prayed for in her complaint, the District Court set aside the agency decision to deny the claimed benefits and remanded to give her an opportunity to secure those benefits. In addition, unlike the Secretary in *Finklestein*, the appellant here would not be prevented from obtaining review of any aspect of the district court decision below following the remand, in the event she does not obtain the claimed benefits on remand. And, unlike the Secretary in *Finklestein*, the appellant here does not seek reversal or even vacatur of the district court judgment, but instead seeks reversal of the *agency* decision, for reasons different than those stated in the district court opinion.

The Court of Appeals below concluded that—in these starkly different circumstances from *Finklestein*—the appeal by the claimant in this case should be dismissed. As we explain, that ruling comports with Section 405(g), as well as with settled principles governing the review of judgments in other civil actions, and accordingly should be affirmed.

STATEMENT OF THE CASE

Petitioner Sandra K. Forney ("Forney") applied to SSA in November 1991 for disability insurance benefits pursuant to Title II of the Social Security Act, as amended, 42 U.S.C. § 401 *et seq.* Forney claimed that she had been disabled since June 7, 1991, due to fibrositis, a condition which allegedly prevented her from holding or obtaining substantial gainful employment. J.A. 11. Following a hearing, an Administrative Law Judge ("ALJ") found—

based on physician testimony that Forney's condition did not preclude all work, and the ALJ's own doubts as to the credibility of Forney's pain testimony—that Forney was not disabled, and denied her benefits claim. Forney appealed to the SSA Appeals Council, which remanded to the ALJ for further proceedings, including another medical examination. Following a second hearing, the ALJ denied Forney's disability claim, and this time the Appeals Council denied review. Pet. App. 4, 16.

In September 1994, Forney filed a complaint pursuant to 42 U.S.C. § 405(g) in the United States District Court for the District of Oregon. J.A. 34-38. In her prayer for relief, Forney requested that "judgment" be entered in her favor, and that the "court reverse and set aside the decision of [the Commissioner] denying [her] claim for disability benefits," or, "[*i*]*n the alternative,* that th[e] court remand the case back to the [Commissioner] for proper evaluation of the evidence or a hearing *de novo.*" *Id.* 37 (emphasis added). *See also id.* ("Plaintiff files this action requesting the Court to reverse said decision or, in the alternative, to remand this case for proper evaluation of the evidence or a rehearing *de novo* * * *."). The District Court granted outright the latter of the two forms of alternative relief pleaded; it entered a judgment in favor of Forney, setting aside the agency decision and remanding for further proceedings to "determin[e] whether claimant is entitled to benefits." Pet. App. 25; *see id.* 14.

In support of her Section 405(g) claim, Forney argued that the Commissioner's decision was erroneous for four independent, evidentiary reasons: (1) the ALJ improperly discounted the treating physician's testimony; (2) the ALJ improperly discredited Forney's pain testimony; (3) the vocational expert's testimony was based on an erroneous assumption about Forney's physical ability; and (4) the vocational expert incorrectly selected as available employment occupations requiring a residual function capacity which Forney lacks. *Id.* 21-22. Applying the "substantial

evidence" standard, the District Court rejected the first three of these arguments. *Id.* 22-24. But it accepted the fourth, and found that "the [Commissioner] has not sustained [his] burden of showing that claimant can engage in substantial gainful work in the economy, and the case must be remanded." *Id.* 25. On May 24, 1995, the District Court entered judgment in Forney's favor, "remand-[ing] to the [Commissioner] for further proceedings." *Id.* 14.[3]

Although Forney secured the judgment and relief prayed for in her complaint, she filed a timely notice of appeal. On appeal, Forney did not request reversal or vacatur of any aspect of the district court judgment in her favor. Intead, she focused her attack squarely on the *Commissioner*'s decision to deny benefits—which, of course, the District Court had already set aside—and argued that that decision was erroneous for the three additional reasons that Forney had advanced in the District Court. *See* Pet. C.A. Br. 18. With regard to relief, Forney requested in the appellate court that the "*agency's* decision should be reversed and remanded with instructions to find Forney disabled beginning June 7, 1991." *Id.* 35 (emphasis added). *See id.* 2 ("Forney appeals, and requests a finding of disability and payment of benefits * * *.").

The Court of Appeals dismissed Forney's appeal. It first concluded that, under *Sullivan* v. *Finklestein, supra,* the district court judgment must be regarded as " 'final,' in a formalistic sense." Pet. App. 10. "That fact, how-

[3] As is customary, the District Court did not specify the precise proceedings that must take place on remand. But the court stated that the "further proceedings" should be "in accordance with [its] opinion," and, as noted, that opinion specifically held that the Commissioner had erred "in determining whether claimant is entitled to benefits." Pet. App. 24. As the government has indicated, it is "likely" that the remand proceedings will involve the presentation of "additional medical evidence or testimony in support of [Forney's] application for benefits." U.S. Br. 27.

ever, does not necessarily entitle Forney to appeal the district court's decision." *Id.* Indeed, as the court explained, "[a] prevailing party normally may not appeal the decision in its favor." *Id.* And there are "compelling reasons * * * for declining to permit a claimant in Forney's position from appealing the remand order she succeeded in obtaining," including that such a claimant "may, on remand, secure *all* of the relief she seeks," rendering appellate review of the district court decision "wholly unnecessary." *Id.* 11 (emphasis added).[4] At the same time, the court cautioned, processing such an appeal could "waste judicial effort, interfere unduly with the * * * administrative agenc[y], and require * * * adjudicat[ion] on a less than full record." *Id.*

The only remaining issue was whether Forney—like the Secretary in *Finklestein*—"must be allowed to appeal th[e] issues now or [risk] forever los[ing] her right to contest them." *Id.* 12. "The answer is 'no.'" *Id.* If Forney is denied benefits on remand, she may file an action pursuant to Section 405(g), contesting any aspect of the district court decision in this proceeding. *Id.* "It is not surprising or unfair that, should Forney return to district court after being denied benefits on remand, the district court likely will adhere to its prior rulings." *Id.* But, the court emphasized, Forney would not be barred by preclusion principles from challenging those rulings in an appeal in the subsequent action, because none of those

[4] The Court of Appeals was careful to add that it was *not* presented with a situation where "a claimant is foreclosed by the district court's remand decision from part of the benefits sought." Pet. App. 10 n.5. Neither, of course, is this Court. As the Court of Appeals emphasized, "the remand order [in this case] does *not* foreclose the possibility of the claimant obtaining *all* of the relief sought [on remand]." *Id.* (emphasis in original). *See id.* 9 ("Forney possibly may obtain all the relief she seeks in the administrative proceeding on remand."). *See also* U.S. Br. 25 ("[T]he district court's remand might ultimately result in an award of all of the benefits claimed.") (internal quotation marks omitted); U.S. Cert. Resp. 9 (same).

rulings was necessary to the district court judgment in this case. *Id.*[5] Thus, in the event she does not obtain the claimed benefits on remand, Forney may obtain review of the same "rulings that we do not permit her to appeal today." *Id.* 13.

On January 16, 1998, this Court granted a writ of certiorari. 118 S. Ct. 751. Shortly thereafter, it invited amicus curiae to present argument in support of the judgment below. *Id.* at 902.

SUMMARY OF ARGUMENT

Judgments entered pursuant to Section 405(g) are "subject to review" according to the same principles governing the review of "judgment[s] in other civil actions." 42 U.S.C. § 405(g). One of those principles is that "only a party aggrieved by a judgment or order of a district court" has standing to appeal it. *Deposit Guaranty Nat'l Bank* v. *Roper*, 445 U.S. 326, 333 (1980). A related principle is that courts "review[] judgments, not statements in opinions." *California* v. *Rooney*, 483 U.S. 307, 311 (1987) (per curiam) (internal quotation marks omitted). These principles prevent a party who has secured a judgment in her favor from appealing rulings or findings unnecessary to that judgment, even if they could possibly be adverse to the party's long-term interests. Application of these principles to Section 405(g) judgments requires the dismissal of Forney's appeal, and those like it .

[5] The court explained: "The judgment that Forney has just secured is a sentence-four remand to the Secretary. The district court's rulings against Forney on the issues of rejection of physician's testimony, discrediting of Forney's pain testimony, and inclusion of Forney's physical limitations in the expert's hypothetical questions, were all unnecessary to the remand. The remand was based solely on the error of the vocational expert in testifying that Forney could perform occupations requiring frequent or constant reaching." Pet. App. 13.

To begin with, Forney is not aggrieved by the district court judgment and, thus, lacks standing to appeal it. That judgment is entirely in Forney's favor, and grants outright one of the two forms of alternative relief prayed for in her complaint. The district court's refusal to grant the other alternative, and to order the award of the claimed benefits at this time, does not, in any event, injure Forney because it is undisputed that she may yet secure those benefits on remand. The testing of the effect of the district court judgment must abide the proceedings on remand; "only then," if Forney is denied benefits, "will [she] have been aggrieved." *Parr* v. *United States*, 351 U.S. 513, 517 (1956). The time and expense of litigating on remand—as opposed to pursuing an appeal—does not confer standing upon Forney to appeal the favorable district court judgment now. That is a necessary, if non-utopian, consequence of attempting to secure government benefits in a judicial system that lacks inexhaustible appellate resources.

Because Forney emphatically does not challenge the *judgment* in her favor, her appeal also runs afoul of the rule that courts review judgments, not statements in opinions. She seeks to appeal the District Court's refusal to adopt the three additional reasons she gave in support of setting aside the Commissioner's decision. But those rulings—embodied only by statements in the district court opinion—are not necessary to the district court judgment setting aside the agency decision and remanding for the fourth reason given by Forney, and accordingly are not subject to review in this proceeding. Moreover, the fact that these statements may be regarded on remand as "law of the case" does not make "review appropriate at this stage." *California* v. *Rooney*, 483 U.S. at 312-313. Because the challenged statements are not necessary to the district court judgment, Forney will not be precluded from challenging them in subsequent proceedings, which Forney is free to initiate if she does not obtain the claimed benefits on remand.

Practical and institutional considerations also counsel in favor of barring appeals by claimants in Forney's position. Claimants who win Section 405(g) remand orders are far more likely to secure the claimed benefits on remand than in an appeal. If they do not prevail on remand, they may obtain federal appellate review in a subsequent Section 405(g) proceeding. On the other hand, permitting immediate appeals will give hundreds or even thousands of individuals each year the option to file factually intensive and, in most cases, legally meritless appeals. There is no compelling reason to saddle the federal courts with such appeals, especially when they are likely to be rendered "wholly unnecessary" (Pet. App. 11) if claimants are required to return to the agency first. Requiring claimants who win Section 405(g) remands to follow this course also accords proper respect to SSA, the coordinate branch of government charged by Congress with the responsibility for making social security benefits determinations in the first instance.

The judgment of the Court of Appeals should be affirmed.

ARGUMENT

I. SECTION 405(g) JUDGMENTS ARE "SUBJECT TO REVIEW IN THE SAME MANNER AS * * * JUDGMENT[S] IN OTHER CIVIL ACTIONS."

A district court judgment remanding to SSA for further proceedings pursuant to sentence four of Section 405(g) is "subject to review in the same manner as a judgment in other civil actions." 42 U.S.C. § 405(g). That follows from the express terms of sentence four of Section 405(g)—which authorizes district courts "to enter * * * a *judgment* affirming, modifying, or reversing the decision of the Commissioner * * *, with or without remanding the cause for a rehearing," *id.* (emphasis added)—and sentence eight of that provision—which states that "[t]he *judgment* of the court shall be final

except that it shall be subject to review in the same manner as a judgment in other civil actions," *id.* (emphasis added). *See Goatcher* v. *Chater*, 57 F.3d 980, 981 (10th Cir. 1995) (adopting plain meaning construction of Section 405(g)); *O'Connor* v. *Shalala*, 23 F.3d 1232, 1233 (7th Cir. 1994) (same); *see also Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 254 (1992) (Congress "says in a statute what it means and means in a statute what it says").[6]

Thus, as both Forney and the government acknowledge in their opening briefs, under the express terms of Section 405(g), the pertinent inquiry in determining whether Forney may appeal the district court judgment in this case is whether the judgment would be appealable by a party in Forney's position "in other civil actions." 42 U.S.C. § 405(g). *See* U.S. Br. 17 ("Under the eighth sentence of 42 U.S.C. 405(g), a sentence-four final judgment is subject to judicial review 'in the same manner as a judgment in other civil actions.' Thus, proceedings under the provision are subject to general principles of appellate review, including the requirement that a party have standing to appeal."); Pet. Br. 10-11, 12 (applying same construction); U.S. Cert. Resp. 9 (looking to "principles generally applicable to 'other civil actions'") (quoting Section 405(g)).[7]

[6] While legislative history is least probative when, as here, the meaning of the statute is plain on its face, we note that the legislative history of Section 405(g) is silent on this particular point. *See* H.R. Rep. No. 76-728, at 43 (1939); S. Rep. No. 76-734, at 52 (1939).

[7] In light of this Court's decision in *Finklestein*, 496 U.S. at 624-628, it is unclear whether sentence eight's "except" clause may be construed to qualify whether a Section 405(g) judgment is "final" in the first place. We note, however, that in other civil actions the type of remand order entered below plainly would *not* be final or appealable by a party in Forney's position. "The courts of appeals * * * have uniformly held that, as a general rule, a remand order [to an agency] is 'interlocutory' rather than 'final,' and thus may not be appealed immediately (unless, of course, it is certified pursuant to § 1292)." *Occidental Petroleum Corp.* v. *SEC*, 873 F.2d 325, 329 (D.C. Cir. 1989); *Director, Office of Workers' Compensation Programs* v. *Bath Iron Works Corp.*, 853 F.2d 11, 13-15 (1st Cir. 1988) (per curiam) (same); *Bohms* v. *Gardner*, 381 F.2d 283, 285 (8th Cir. 1967) (opinion by Blackmun, J.). That conclusion accords with this Court's own finality precedents. *See, e.g., Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368, 373 (1981); *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 467 (1978).

The result in *Finklestein* is not to the contrary because it fits within a corollary line of cases holding, primarily for practical reasons, that administrative remand orders should be treated as if they were final when denying an immediate appeal could prevent the agency from obtaining review altogether. *See* 496 U.S. at 625 (expressing "grave doubt" as to whether agency could obtain review of adverse judgment if claimant prevailed on remand); *see also, e.g., Travis* v. *Sullivan*, 985 F.2d 919, 921-923 (7th Cir. 1993); *Travelstead* v. *Derwinski*, 978 F.2d 1244, 1247-49 (Fed. Cir. 1992); *Monongahela Valley Hosp., Inc.* v. *Sullivan*, 945 F.2d 576, 586 (3d Cir. 1991); *Colvin* v. *Sullivan*, 939 F.2d 153, 155 (4th Cir. 1991). These cases are the "exception to th[e] general rule" that remand orders are *not* final or appealable. *Occidental Petroleum Corp.*, 873 F.2d at 330. The instant case falls outside the exception because it is clear that Forney may obtain review if she does not prevail on remand. *See* Part II.C, *infra*. Thus, quite unlike the *Finklestein* paradigm, there is no compelling practical reason to treat the type of remand order here as final.

Because of the settled rule in other civil actions that administrative remand orders are not final or appealable except in the narrow *Finklestein* context, we do not agree that holding that the judgment below is non-final would be "analytically untidy." Pet. App. 9. Quite the contrary, such a ruling would square perfectly with existing precedent in other actions. Moreover, Congress' use of the qualifier "except," rather than the conjunctive "and" (or the like) immediately following "final" in the eighth sentence of Section 405(g) arguably indicates that it intended the finality of sentence-four remands to be gauged in the same manner as the finality of remands "in other civil actions." The result, if not all the language, in *Finklestein* accords with such a construction because, as explained, the type of remand in that case *is* appealable in other civil actions. In any event, even assuming the judgment below must be regarded as final under Section 405(g) and *Finklestein*, it still is not subject to review for the reasons explained in Part II, *infra*.

As we explain below, that inquiry leads to the conclusion that the Court of Appeals correctly dismissed Forney's

appeal because, in other civil actions, the judgment below would not be subject to review by a party in Forney's position.

II. IN OTHER CIVIL ACTIONS, THE JUDGMENT ENTERED BELOW WOULD NOT BE APPEALABLE BY A PARTY IN FORNEY'S POSITION.

A. Forney Is Not Aggrieved By The District Court Judgment, And Thus Lacks Standing To Appeal It.

As the government acknowledges (Br. 17-18), in other civil actions it is well settled that "only a party aggrieved by a judgment or order of a district court may exercise the statutory right to appeal therefrom [under 28 U.S.C. § 1291]." *Deposit Guaranty Nat'l Bank* v. *Roper*, 445 U.S. at 333. "Th[is] rule is one of federal appellate practice, * * * derived from the federal statutes granting appellate jurisdiction and the historic practices of the appellate courts." *Id.* Under it, winning parties lack "standing" to appeal judgments in their favor, and appellate courts, in turn, lack jurisdiction to hear such appeals under Section 1291. *See id.*; *Perez* v. *Ledesma*, 401 U.S. 82, 87 n.3 (1971); *Gunn* v. *University Comm. to End the War in Viet Nam*, 399 U.S. 383, 390 n.5 (1970); *Public Serv. Comm'n* v. *Brashear Freight Lines, Inc.*, 306 U.S. 204, 206-207 (1939) (per curiam); 15A Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3902 (2d ed. 1992).[8]

Applying this settled rule, the Court of Appeals below correctly held that Forney lacks standing to appeal. *See*

[8] Scores of lower court precedents are to the same effect. *See, e.g., Concerned Citizens of Cohocton Valley, Inc.* v. *New York State Dep't of Envt'l Conservation*, 127 F.3d 201, 204 (2d Cir. 1997); *In re DES Litig.*, 7 F.3d 20, 23-25 (2d Cir. 1993); *In re Sims*, 994 F.2d 210, 214 (5th Cir. 1993), *cert. denied*, 510 U.S. 1049 (1994); *Showtime Networks Inc.* v. *FCC*, 932 F.2d 1, 4-5 (D.C. Cir. 1991); *Farr* v. *Gruber*, 950 F.2d 399, 401 (7th Cir. 1991); *Bath Iron Works Corp.* v. *Coulombe*, 888 F.2d 179, 180 (1st Cir. 1989) (per curiam).

Pet. App. 10-13. To begin with, Forney indisputably "won" in the District Court. In her complaint, she asked the District Court "to reverse said decision or, in the alternative, to remand this case for proper evaluation of the evidence or a rehearing *de novo*." J.A. 37. The District Court granted the alternative relief outright, entering a judgment setting aside the agency decision and remanding for further proceedings. Pet. App. 14, 25. This is, to borrow a phrase, a "substantial victory." *See* U.S. Br. in *Sullivan* v. *Finklestein*, No. 89-504, at 21 n.17 ("[T]he district court's order finding the Secretary's decision to have been legally erroneous and remanding the cause to the Secretary for further proceedings generally represents a *substantial victory* for a claimant.") (emphasis added); *see also Shalala* v. *Schaefer*, 509 U.S. 292, 302 (1993) ("A sentence-four remand, of course, is a judgment *for* the plaintiff.") (emphasis in original).[9]

It is easy to see why this is so. It is undisputed that the "remand might ultimately 'result in an award of *all* of the benefits claimed.' " U.S. Br. 25 (quoting Pet. App. 10) (emphasis added); *see* U.S. Cert. Resp. 9 (same). The receipt of such benefits, moreover, is not simply possible, it is—as the government emphasizes—*probable*. *See* U.S. Br. 28 ("claimants historically have very good prospects of fully prevailing on remand"). Statistics show that "following additional development of the record on remand, benefits are awarded in approximately 65% of Social Security cases that are remanded to the Secretary." U.S. Cert. Resp. 10 (internal quotation marks omitted); U.S. Br. 28 ("benefits are awarded in approximately 60% of Social Security cases remanded"). Furthermore, as explained below, in the event Forney does not obtain the

[9] In this regard, Forney stands in an entirely different position than the Secretary in *Finklestein*. Forney won her action; the Secretary in *Finklestein* lost. Indeed, the judgment in *Finklestein* not only set aside the Secretary's disability determination, but also "essentially invalidated * * * the Secretary's regulations." 496 U.S. at 623-625.

claimed benefits on remand, she may return to federal court and obtain review of the district court rulings she seeks to challenge here. *See* Part II.C, *infra*.

Under a common sense approach to the appellate standing inquiry, therefore, it follows that Forney was not aggrieved by the district court judgment in her favor and, accordingly, may not "exercise the statutory right to appeal therefrom." *Roper*, 445 U.S. at 333.[10]

Forney and the government nevertheless insist that Forney *is* aggrieved by the ruling below, and thus has standing to appeal it, because the District Court did not reverse "outright." Pet. Br. 18; U.S. Br. 22-23. There are several problems with this position, beginning with the fact that, at least as a matter of pleading, Forney got everything she asked for when the District Court set aside the agency decision and remanded. Federal Rule of Civil Procedure 8(a) gives plaintiffs the right to seek "[r]elief in the alter-

[10] In addition to meeting the requirements of "the [federal] statutes granting appellate jurisdiction and the historic practices of the appellate court," *Roper*, 445 U.S. at 333, Forney—like all federal court litigants—must also satisfy the requirements of Article III of the Constitution. *See Arizonans for Official English* v. *Arizona*, 117 S. Ct. 1055, 1067 (1997) ("The standing Article III requires must be met by persons seeking appellate review"). Because, for the reasons discussed, Forney is not aggrieved by the substantial victory she secured, she no longer meets Article III's "injury in fact" requirement. *See Steel Co.* v. *Citizens for a Better Env't*, 66 U.S.L.W. 4174, 4179 (U.S. Mar. 4, 1998) (Article III requires "[f]irst and foremost, [that] there must be alleged (and ultimately proven) an 'injury in fact'—a harm suffered by the plaintiff that is 'concrete' and 'actual or imminent, not conjectural or 'hypothetical.' ") (internal quotation marks omitted); *Affiliated Ute Citizens of State of Utah* v. *Ute Indian Tribe of Uintah & Ouray Reservation*, 22 F.3d 254, 256 (10th Cir. 1994) (prevailing party lacks Article III standing to appeal judgment in its favor). But this Court need not reach that constitutional question because, as we explain, Forney lacks standing to appeal under the non-constitutional principles recognized in *Roper*. *See* 445 U.S. at 333 (rule that prevailing parties may not appeal "does not have its source * * * in Art. III," but rather in statutory and common law principles).

native." Fed. R. Civ. P. 8(a). Forney did just that: she asked the court "to reverse * * * or, *in the alternative*, to remand * * *." J.A. 37 (emphasis added). "[H]aving received the alternative relief [she] requested, [Forney] cannot now complain that the court did not grant [the other alternative]." *Star Fin. Servs., Inc.* v. *AASTAR Mortgage Corp.*, 89 F.3d 5, 12 (1st Cir. 1996).[11] Because Forney in fact "receive[d] all that [s]he has sought," she "is not aggrieved by the judgment affording relief and cannot appeal from it." *Roper*, 445 U.S. at 333.[12]

In any event, Forney is not aggrieved by the District Court's refusal to grant the other form of alternative relief and to order that she is entitled to the requested benefits outright because, as all agree, she may yet secure those benefits on remand. Unless or until Forney is denied those

[11] *See also Southern Natural Gas Co.* v. *FERC*, 877 F.2d 1066, 1070 (D.C. Cir. 1989) (petitioner that received one of two forms of alternative relief was not "aggrieved by [agency]'s rejection of [one alternative] in any way that is redressible by this court"); *United States* v. *Ligori*, 658 F.2d 130, 134 (3d Cir. 1981) (Higginbotham, J., concurring) ("[party] received the alternative relief which he requested and is entitled to no more"); *In re Yarn Processing Patent Validity Litig.*, 530 F.2d 83, 88 (5th Cir. 1976) ("motion [was] moot because [movant] had obtained the full measure of the alternative relief requested"); *Manufacturers Credit Corp.* v. *SEC*, 395 F.2d 833, 846 (3d Cir. 1968) (parties lack standing to appeal order that grants one form of alternative relief, while preserving opportunity to secure other alternative in later proceedings).

[12] Both Forney (Br. n.4) and the government (Br. 22) belatedly and self-servingly characterize Forney's remand request as "alternative and *lesser*" relief. (Emphasis added.) No such characterization was made in Forney's actual prayer for relief; in pertinent part, the complaint simply requests one of two alternative forms of relief—(A) reversal, or (B) an order setting aside the agency decision and remanding for another hearing. *See* J.A. 37. Only after the District Court granted alternative B did Forney insist upon alternative A.

benefits on remand, she is not injured by a judgment that presents her with the opportunity to secure the requested relief in its entirety.

This is the lesson of *Parr* v. *Uni.. d States, supra.* In that case, a criminal defendant (Parr) sought to appeal the dismissal of an indictment, over his "vigorous opposition," with the dismissal followed by a subsequent indictment and trial in a foreign district. 351 U.S. at 515 & n.7. Emphasizing that "[o]nly one injured by the judgment sought to be reviewed can appeal," Justice Harlan, writing for the Court, explained that "an appeal from [the indictment's] dismissal will not lie." *Id.* at 516. Parr was not "injured" by the dismissal order because it was "in his favor." *Id.* at 517. "So far as [Parr]'s standing to appeal is concerned," the Court explained, "it makes no difference [that] the dismissal still leaves him open to further prosecution." *Id.* "The testing of the effect of the dismissal order must abide [Parr]'s trial, and *only then,* if convicted, will he have been aggrieved." *Id.* (emphasis added). The fact that this forced Parr "to hazard a trial under the [second] indictment before he can get a review of whether he should have been tried * * * under the [first] indictment" did not alter the result. *Id.* at 519.

Here, too, the testing of the effect of the district court judgment in Forney's favor must abide the proceedings on remand. "[O]nly then," if Forney is denied the benefits she claims the District Court should have awarded outright, "will [s]he have been aggrieved" by the judgment. *Id.* at 517. Moreover, as in *Parr,* the fact that this conclusion subjects Forney to the time and expense of additional proceedings on remand does not confer standing upon her to appeal from the judgment setting aside the agency decision. Indeed, any burden borne by Forney in this regard is slight in comparison to the "discomfiture and costs of a *prosecution* for crime," which Parr faced before he would possess standing to obtain review of the

favorable order he claimed aggrieved him. *Id.* at 519-520 (emphasis added). At this point, in other words, any "injury" stemming from the District Court's refusal to order an immediate award of the claimed benefits is simply too speculative to confer standing upon Forney to appeal.

The rationale of *Parr* accords with lower court decisions holding that parties who succeed in obtaining an agency decision reversing and remanding for further administrative proceedings are not sufficiently "aggrieved" to obtain federal court review. Thus, for example, in *CH2M Hill Central, Inc.* v. *Herman,* 131 F.3d 1244 (7th Cir. 1997), a company petitioned under 29 U.S.C. § 660(a) for review of an order issued by the Occupational Safety and Health Review Commission (Commission), reversing an ALJ ruling that the company was not subject to penalties and remanding for further proceedings that might result in imposition of penalties. Section 660(a) permits "[a]ny person adversely affected or aggrieved by an order of the Commission" to appeal the order directly to a federal circuit court. *Id.* Writing for the court, Judge Easterbrook had little difficulty in concluding that the company did not meet that standard. As he put it, "[f]or all we know [the company] will prevail on remand, and the Commission's opinion will cause it no injury—none, that is, beyond the cost of litigation (which does not permit review) * * *." 131 F.3d at 1247. The same, of course, is true with respect to Forney's situation here.[13]

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[13] *Cf. Director, Office of Workers' Compensation Programs* v. *Bath Iron Works Corp.,* 853 F.2d at 14 ("Because the [agency] did not purport definitively to resolve the controversy between the parties, but instead remanded to the ALJ for further proceedings, the present order did not close out the case. No legal consequences flowed directly and inexorably from it. To the contrary, the order contemplated that something further needed to be done."); *United States Office of Personnel Management* v. *FLRA,* 905 F.2d 430, 435 (D.C. Cir. 1990) (Silberman, J., concurring) (parties successful before the agency did not become aggrieved until agency in fact changed its position after remand); *Stripe-A-Zone* v. *Occupational*

While relegating *Parr* to a naked *"But cf."* citation (U.S. Br. 21 n.11), the government cites several lower court cases for the proposition that courts "routinely entertain appeals by parties who prevailed on the merits but were nonetheless aggrieved because they did not obtain all the relief they requested." *Id.* 21 n.12. In none of these cases, however, did the appellant still have the opportunity to secure the denied relief on remand, or in other proceedings yet to come. Instead, in each of the cited cases, the district court had denied the requested relief, there was no opportunity left to obtain that relief, and the only avenue of challenging the denial was immediate appellate review. These cases are wholly inapposite where, as here, the challenged decision affords the appellant an opportunity to secure all the relief to which she claims she is entitled in further proceedings expressly contemplated by the challenged decision.[14] Accordingly, they do not alter the con-

Safety & Health Review Comm'rs, 643 F.2d 230, 233 (5th Cir. 1981) (per curiam) (dismissing petition for review of agency remand order on ground that petitioner with opportunity to prevail on remand was not "aggrieved").

[14] *Deposit Guaranty National Bank* v. *Roper*, *supra*, is distinguishable on similar grounds. In that case, the Court held that class action plaintiffs had standing to appeal denial of class certification, even though judgment had been entered in the plaintiffs' favor. The Court grounded its standing holding on the fact that, if the class were certified, plaintiffs would be able to shift part of the litigation costs to other class members. *See* 445 U.S. at 334 n.6. The significant financial consequences of the order denying certification were fixed; there was no opportunity for the plaintiffs in *Roper* to challenge that ruling in further proceedings yet to come.

Roper is distinguishable in two additional respects. First, the judgment in that case was entered "over [plaintiffs'] continued objections," as the result of the defendant's decision to tender the requested relief to plaintiffs individually, rather than face a class action. *Id.* at 332. The appellant in this case, by contrast, specifically requested the judgment she received, albeit in the alternative. Second, the plaintiffs in *Roper* sought to appeal only to obtain review of a "procedural error, *not for the purpose of [challenging] the merits of the substantive controversy*," and the Court specifically limited plaintiffs' right to appeal as such. *Id.* at 336 (em-

clusion that Forney lacks standing to challenge the remand order she secured.[16]

B. Forney Does Not Challenge The District Court Judgment, But Rather Statements Unnecessary To That Judgment.

Forney's appeal also runs afoul of another basic principle governing appeals in other civil actions: courts "review[] judgments, not statements in opinions." *California* v. *Rooney*, 483 U.S. at 311 (internal quotation marks omitted). *See* U.S. Br. 18; *Chevron U.S.A., Inc.* v.

phasis added). The appellant here, by contrast, seeks review *only* of issues going to the "substantive controversy."

[15] Contrary to the suggestion of Forney (Br. 24), it is by no means clear that outright reversal is even available relief in this case. In reviewing a decision to deny benefits under Section 405(g), a federal court may not reweigh the evidence or make *sua sponte* disability determinations; Congress vested that responsibility in the agency. *See, e.g., Nelson* v. *Apfel*, 131 F.3d 1228, 1234 (7th Cir. 1997); *Hays* v. *Sullivan*, 907 F.2d 1453, 1456 (4th Cir. 1990). Thus, as the government observes (Br. 29), outright reversal is available "only in limited circumstances," such as where "all essential factual issues have been resolved." *Faucher* v. *Secretary of Health & Human Servs.*, 17 F.3d 171, 176 (6th Cir. 1994). Due to the nature of the challenges made and the record developed in this case, outright reversal—as the government has argued all along—is simply not feasible. *See* U.S. Br. 25 n.15; U.S. C.A. Br. 14-22. Indeed, even with respect to the argument that Forney won below, a remand is plainly necessary so that additional evidence may be taken on whether employment opportunities exist for someone *with* Forney's ability. A federal court (especially an appellate one) may not simply make that determination *de novo*. *See FPC* v. *Idaho Power Co.*, 344 U.S. 17, 21 (1952) (court lacks "power to exercise an essentially administrative function"); *Faucher*, 17 F.3d at 176 (remand required where vocational expert's testimony was based on erroneous assumption as to claimant's ability). Similarly, the other issues raised by Forney—especially those concerning witness credibility findings, *see* Pet. App. 21-22—are scarcely the type of challenges that, even when credited, lend themselves to outright reversal by a court lacking the authority to reweigh the evidence.

NRDC, Inc., 467 U.S. 837, 842 (1984) ("since this Court reviews judgments, not opinions, we must determine whether the Court of Appeals' legal error resulted in an erroneous judgment") (footnote omitted); *Hutto* v. *Davis*, 454 U.S. 370, 384-385 n.2 (1982) (per curiam) ("[T]his Court reviews judgments, not opinions, and therefore can reverse [a] judgment * * * only if it is not sustainable on any basis."); *accord Owens-Illinois, Inc.* v. *Aetna Cas. & Sur. Co.*, 990 F.2d 865, 875 (6th Cir. 1993). This rule prevents a party such as Forney who has secured a favorable judgment from bringing an appeal arguing that the court should have decided the case based on additional or alternative reasons than those set forth in the opinion accompanying the judgment.[16]

Thus, in *California* v. *Rooney*, *supra*, this Court declined to review a state court decision holding that evidence found in a trash bin was insufficient to establish probable cause for a search warrant, where the decision held that probable cause was established on other grounds. As the Court observed, "the judgment of the Court of Appeal was entirely in the State's favor—the search warrant which was the sole focus of the litigation was deemed valid." 483 U.S. at 311. "The fact that the Court of

[16] The rule that courts only review judgments is based on the same principles undergirding the appellate standing doctrine. As a result, courts often invoke both principles in dismissing appeals. *See, e.g., Concerned Citizens of Cohocton Valley, Inc.* v. *New York State Dep't of Envt'l Conservation*, 127 F.3d at 204 ("[I]f a court grants the ultimate relief a party requested, even though on grounds other than those urged by the prevailing party, that party is generally not 'aggrieved' by the judgment and may not appeal.") (citation omitted); *Penda Corp.* v. *United States*, 44 F.3d 967, 972 (Fed. Cir. 1994) ("Courts * * * have not recognized standing to appeal where a party does not seek reversal of the judgment but asks only for review of unfavorable findings."), *cert. denied*, 514 U.S. 1110 (1995); *Allstate Ins. Co.* v. *A.A. McNamara & Sons, Inc.*, 1 F.3d 133, 137 (2d Cir. 1993) (appellant lacks standing where she "is not urging that we alter the judgment in any way, but rather that we alter the reasons underlying it").

Appeal reached its decision through analysis different than this Court might have used does not make it appropriate * * * for the prevailing party to request us to review it." *Id.* Moreover, the fact that the reasons given by the lower court for reaching its judgment "may [be] adverse to the State's long-term interests does not allow the State to claim status as a losing party for purposes of th[e] Court's review." *Id.*

Forney's appeal fails under the reasoning of *Rooney* and similar cases because she emphatically does *not* seek to appeal the district court judgment in her favor. *See* Pet. Br. 28 ("Petitioner seeks to appeal *not* from the remand order itself, but from the adverse rulings on issues upon which the district court *declined* to grant relief.") (emphasis in original). The "adverse rulings on issues" (*id.*) that Forney does seek to appeal consist of the District Court's refusal to credit the three additional, evidentiary arguments she made in support of her claim. But those rulings are not found in—and are not necessary to —the district court judgment setting aside the Commissioner's decision based on the *fourth* argument Forney made for doing so. *See* Pet. App. 14.[17] Rather, they are

[17] As the Court of Appeals found, the district court judgment "was based solely on the error of the vocational expert in testifying that Forney could perform occupations requiring frequent or constant reaching," Pet. App. 13, just as the judgment in *Rooney* was based solely on the non-trash evidence offered to establish probable cause. None of the findings or rulings that Forney seeks to challenge here was necessary to that judgment; indeed, those rulings—which reaffirm aspects of the Commissioner's decision—are *contrary* to the judgment setting aside that decision. *See id.*, quoted note 4, *supra*; *Fletcher* v. *Atex*, Inc., 68 F.3d 1451, 1458 (2d Cir. 1995). *See also* 18 Wright & Miller, *supra*, § 4421, at 199 ("findings that are contrary to the judgment in the sense that, standing alone, they would conduce to an opposite judgment * * * have long been accepted as paradigms of * * * *unnecessary* conclusions [to the judgment]") (emphasis added). This should come as little surprise: "a finding adverse to an otherwise fully prevailing party will *rarely* be necessary to the judgment." 20 James W. Moore, *Moore's Fed-*

simply statements in the district court opinion, which, under the settled rule, are not by themselves appealable.

Forney argues (Br. 18, 28 & n.16) that she must be permitted to appeal these statements because they may adversely affect her on remand.[18] That is to say, *if* Forney does not obtain the claimed benefits on remand, and *if* she then tries to argue that she is entitled to those benefits for the three additional reasons the District Court rejected, she contends she is likely to be barred from doing so under the "law of the case" doctrine. Pet. Br. 28 n.16; *see* U.S. Br. 24. As this Court held when confronted with essentially the same argument in *Rooney*, however, "[t]here are two too many 'ifs' in that proposition to make * * * review appropriate at this stage." 483 U.S. at 312-313. Moreover, as in *Rooney*, "[e]ven if everything [Forney] fears comes to bear," *id.*, she will have an opportunity to seek review in subsequent proceedings. *See* Part II.C, *infra*. The fact that the district court decision is likely to be treated as "law-of-the-case" in the meantime "provides no justification for * * * granting review at this stage." 483 U.S. at 312 n.2.

Furthermore, the notion that a party is entitled to immediate review of any ruling that may "affect the character of * * * further proceedings" (U.S. Br. 23) is far-fetched. Courts routinely make rulings that have as much and, in-

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eral Practice and Procedure ¶ 303.10[2][b], at 303-20 to 303-21 (3d ed. 1997) (emphasis added).

[18] The government seems to take conflicting positions on this point: on the one hand, it argues that Forney has standing to appeal because she will be "adversely affected by the[] rulings in the course of further proceedings," U.S. Br. 24, but, on the other hand, it posits that Forney "is entitled to appeal the court's remand order, *not because of putative preclusive effects*, but because [Forney] challenges a final judgment that did not grant her all the relief she requested." *Id.* 31 (emphasis added). It is unclear which of these seemingly juxtaposed positions is the government's bottom line.

deed, far greater impact on the course of future proceedings than the type of evidentiary rulings Forney seeks to challenge here, including rulings dismissing claims outright, *e.g.*, *Jefferson* v. *City of Tarrant*, 118 S. Ct. 481 (1997), and directing dispositive findings, *e.g.*, *Baker* v. *General Motors Corp.*, 86 F.3d 811 (8th Cir. 1996), *rev'd on other grounds*, 118 S. Ct. 657 (1998). Yet the fact that this requires parties to endure the time and expense of having to litigate under such terms before obtaining appellate review is invariably deemed to be insufficient to render their objections immediately appealable, so long as the parties eventually will have an opportunity to obtain such review, as all agree Forney will here.[19] The ever burgeoning workload of the appellate courts demands such a rule. *See infra* at 31-32.

The particular manner in which Forney framed her appeal also underscores the impropriety of that appeal under the rule that courts only review judgments. Nowhere in her appellate brief did she ask the Court of Appeals to reverse or vacate the district court judgment. *Cf. In re DES Litig.*, 7 F.3d at 25 (dismissing appeal where, as here, "appellate brief does not ask [court] to

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[19] *Cf. Jefferson* v. *City of Tarrant*, 118 S. Ct. at 486 ("however incorrect" state court's dismissal of federal civil rights claim may be, plaintiffs must proceed with trial on state law count before they may challenge in Supreme Court dismissal of the federal count); *Parr* v. *United States*, 351 U.S. at 519 (plaintiff must "hazard a trial under the [second] indictment before he can get a review of whether he should have been tried in [his home district] under the [first] indictment"); *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (Opinion of Scalia, J., respecting denial of petition for writ of certiorari) (state must complete elaborate process of developing plan to cure constitutional violation before it may obtain review of question whether violation exists in first place); *CH2M Hill Central, Inc.* v. *Herman*, 131 F.3d at 1247 (company facing administrative penalties must complete remand proceedings before it may obtain review of standard under which remand is conducted).

vacate any portion of the *judgment*") (emphasis in original). The reason is simple: the judgment was entirely in her favor. Instead, Forney directed her appeal to the *Commissioner's* decision to deny benefits and, when it came to stating the requested relief, she asked that the "*agency's* decision be reversed and remanded with instructions to find Forney disabled beginning June 7, 1991." Pet. C.A. Br. 35 (emphasis added). But the Court of Appeals could do no such thing. Except where Congress directs otherwise, the federal courts of appeals sit to review district court judgments, not agency decisions. That is the case here. Section 405(g) is addressed explicitly to the "district court[s]"; it confers no special powers on the courts of appeals. 42 U.S.C. § 405(g). *See O'Connor* v. *Shalala*, 23 F.3d at 1234 (Section 405(g) confers remedial authority on district courts, not courts of appeals).

Finally, contrary to the suggestion of the government (Br. 31-32), this Court's decision in *Electrical Fittings Corp.* v. *Thomas & Betts Co.*, 307 U.S. 241 (1939), is of no avail to Forney. In that case, the Court held that a prevailing party may have standing to appeal a judgment in its favor in the narrow circumstance where the "decree itself" purports to adjudicate an issue adversely to the prevailing party. *Id.* at 242. In such circumstances, the Court held, the prevailing party may appeal "to have *this portion of the decree* eliminated," and the court of appeals has "jurisdiction * * * to entertain the appeal, *not for the purpose of passing on the merits*, but to direct reformation of the decree." *Id.* (emphases added). Forney does not come within, or even close to, the rule of *Electrical Fittings* because she does not challenge any aspect of the district court judgment (and the rulings she does challenge are neither contained within nor necessary to that judgment), but instead seeks to appeal solely for the purpose of having the court "pass[] on the merits" (*id.*) of her benefits claim. *See supra* at 21; *Concerned*

Citizens of Cohocton Valley, Inc., 127 F.3d at 205 n.3 (distinguishing *Electrical Fittings* on similar grounds); *In re DES Litig.*, 7 F.3d at 25 (same).[20]

This Court's decision in *Electrical Fittings* is nevertheless instructive because it helps explain why Forney's (Br. 17-18) and the government's (Br. 19-20) reliance on *United States* v. *Jose*, 117 S. Ct. 463 (1996) (per curiam), is misplaced. In *Jose* the Court reinstated an appeal by the Internal Revenue Service ("IRS") from a district court decree which, while upholding the agency's authority to enforce a summons, " 'require[d] [it] to give [the subject of the summons] five days notice if it decides to circulate or transfer the summonsed documents.' " Pet. App. in *United States* v. *Jose*, No. 95-2082, at 19a (district court decree); *see* 117 S. Ct. at 464. The appeal was aimed solely at the five-day notice requirement. Because that requirement was not only necessary to but contained within the "decree itself," the IRS was entitled to bring an appeal "to have this portion of the decree eliminated." *Electrical Fittings*, 307 U.S. at 242. That result, however, does nothing to advance Forney's case: the rulings she challenges are neither contained within nor necessary to the judgment in her favor. *See* Pet. App. 14.

Jose is distinguishable in another significant respect. The appellant in *Jose* was obviously aggrieved by the district court decree imposing the notice requirement. As the government explained in its petition for a writ of certiorari

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[20] As this Court observed in *Roper*, the result in *Electrical Fittings* is explainable on an alternative basis, which also distinguishes it from this case: "[i]n a sense, the petitioner in *Electrical Fittings* sought review of * * * [a] procedural error," "not * * * the merits of the substantive controversy," and the Court determined that it was important, "for policy reasons," to allow the appeal to proceed. 445 U.S. at 335-336 & n.7. The appeal in this case, by contrast, is directed squarely to the merits of the "substantive controversy" —not any procedural error—and, as discussed in Part III, *infra*, policy considerations cut decisively against allowing it.

in that case, the decree's notice requirement "imposes injunctive restrictions on the internal use of summoned information by the [IRS]." Pet. 10. "If the government does not comply with the injunction, its attempt[] to disclose the documents would be punishable by contempt." *Id.* 13 n.4 (internal quotation marks and emphasis omitted; brackets in original). The district court judgment in this case, by contrast, imposes absolutely no restrictions (injunctive or otherwise) on Forney, and certainly does not subject her to possible criminal liability. Quite the contrary, the judgment presents her with an opportunity to secure the very benefits she seeks. Thus, to the extent that *Jose* sheds any light on the appellate standing question in this case, it simply underscores that Forney is *not* aggrieved.[21]

C. The Challenged Statements Are Reviewable In Later Proceedings If Forney Does Not Prevail On Remand.

Forney (Br. 13-14, 25) argues that she must be entitled to bring the instant appeal because a sentence-four remand "terminate[s] the civil action." *Sullivan* v. *Finklestein*, 496 U.S. at 625; *accord Shalala* v. *Schaefer*, 509 U.S. at 299. While it is true that the judgment below terminates this action, this should have no bearing on Forney's standing to appeal it. If a party lacks standing to appeal because she is not aggrieved by a judgment, or impermissibly seeks to challenge findings or rulings unnecessary to that judgment, standing is not automatically conferred simply because dismissal of the appeal will result in the termination of the underlying action. *See, e.g., Parr*

[21] While *Jose* is instructive in this regard, we note that the Court's summary disposition in that case was in fact based on "ripeness," not appellate standing principles. *See* 117 S. Ct. at 464-465. Indeed, the government itself framed the question presented in *Jose* solely in terms of "ripeness." *See* Pet. (I). The government's and Forney's reliance on *Jose* in the instant case is misplaced for this reason, too.

v. *United States*, 351 U.S. 513 (no standing to appeal order that results in termination of criminal proceeding); *In re DES Litig.*, 7 F.3d 20 (no standing to appeal order that results in termination of civil action); *Balcom* v. *Lynn Ladder & Scaffolding Co.*, 806 F.2d 1127 (1st Cir. 1986) (per curiam) (same). The appellate standing doctrine, in other words, is not subject to the exception that every party is entitled to one appeal per action; such an exception would swallow the rule.[22]

The pertinent point—which is not disputed by Forney or the government, and which distinguishes this case from *Finklestein*—is that, in the event Forney is aggrieved by the subsequent rulings below (*i.e.*, if she does not obtain the claimed benefits on remand), she will have an opportunity at that time to obtain review of the unnecessary statements or rulings she seeks to appeal here. As the Court of Appeals explained, if Forney does not obtain the requested benefits on remand, she may initiate a second Section 405(g) action challenging the Commissioner's decision. *See* Pet. App. 12-13. In that proceeding, "the district court will likely adhere to its prior rulings." Pet. App. 12; *see supra* at 22. But nothing will prevent Forney from obtaining appellate review in the second ac-

[22] Forney (Br. 18, 22) cites *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U.S. 1, 12 (1983), and *Brown Shoe Co.* v. *United States*, 370 U.S. 294 (1962), in support of her argument that, because the district court judgment terminates the action, she must be entitled to review here. But those cases turned in relevant part on finality—not standing—principles. There was no question in either case that the parties seeking to appeal were aggrieved by the lower court judgments at issue. *See* 460 U.S. at 7, 12 (refusing appellant's request to stay arbitration and stay federal action for completion of state proceedings that would dispose of federal action); 370 U.S. at 304 (ordering appellant to divest itself of merged assets). In *Moses H. Cone*, moreover, the Court emphasized that "the order [at issue] would be entirely unreviewable if not appealed now." 460 U.S. at 12. Neither case, accordingly, sheds any light on the question whether a prevailing party in Forney's position is entitled to appeal the judgment in this case.

tion of "the issues decided against her in her first, final civil action, in which she 'prevailed.'" Pet. App. 12.

This follows from two settled principles of preclusion law: *first*, a party may not be bound by rulings she was not permitted to appeal, *see id.*; *Restatement (Second) of Judgments* § 28(1) (1982) (preclusion unavailable where "party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment in the initial action") (collecting cases); and, *second*, a party may only be bound by rulings that are necessary to the judgment in the prior case, *see* Pet. App. 12-13; 18 Moore, *supra*, § 132.03[4][a], at 132-105 ("Relitigation of an issue * * * in a prior case * * * is not foreclosed if the decision of the issue was not necessary to the judgment reached in the prior litigation.") (collecting cases). In light of these principles, it is settled that a prevailing party may not be bound in a subsequent action by unnecessary rulings or findings contained in the decision resulting in judgment in the party's favor in the prior action.[23]

The fact that the opportunity for review would arise in a "new civil action" (Pet. Br. 13) does not alter the conclusion that Forney lacks standing to appeal in this proceeding. *Cf. Parr* v. *United States*, 351 U.S. at 515 (de-

[23] *See, e.g., Partmar Corp.* v. *Paramount Pictures Theatres Corp.*, 347 U.S. 89, 99 n.6 (1954) ("when a finding of law or fact is not necessary for a decree * * * the prevailing party may not appeal and the finding does not form the basis for collateral estoppel"); *Gelb* v. *Royal Globe Ins. Co.*, 798 F.2d 38, 44 (2d Cir. 1986) ("a winning party may not appeal issues determined adversely to it by the trial court and, as a consequence, is not barred from relitigating such issues [later]"), *cert. denied*, 480 U.S. 948 (1987); *Balcom* v. *Lynn Ladder & Scaffolding Co.*, 806 F.2d at 1127 ("short and conclusive answer" to winning party's concern about adverse finding in favorable judgment "is that the challenged finding has no collateral estoppel effect, for it was not essential to the favorable judgment"); 18 Wright & Miller, *supra*, § 4433, at 317 (1st ed. 1981) (same).

fendant lacks standing to appeal from dismissal of criminal indictment, even though any challenge to that dismissal would have to be brought in an appeal from a "new indictment" in a separate proceeding). Indeed, it is invariably the case that, unless a prevailing party is entitled to immediate review of unnecessary rulings or findings contained in an opinion accompanying a final, appealable judgment in its favor, the party will be forced to challenge them in a separate action—in the event, that is, such rulings or findings in fact are later asserted against the party. *See, e.g.*, cases cited at note 23, *supra*. But "it has been concluded that it is better to deny appeal and forbid preclusion than to permit appeal in order to support preclusion." *See* 15A Wright & Miller, *supra*, § 3902, at 83 & n.43 (1992). There is no reason to adopt a different practice here.[24]

III. PRACTICAL AND INSTITUTIONAL CONSIDERATIONS COUNSEL IN FAVOR OF HOLDING THAT A PARTY IN FORNEY'S POSITION MAY NOT APPEAL.

Because the district court judgment below is not appealable under the principles governing the review of judgments in other civil actions, it is not appealable in this Section 405(g) action either. *See* Part I, *supra*. The Court need not go any further and, indeed, in light of Congress' express direction that Section 405(g) judgments are "subject to review in the *same* manner as a judgment

[24] Forney's argument also elevates form over substance. As the government has observed, "[a]lthough the second round of judicial review would be a new civil action in court, there is but *one* underlying administrative proceeding before the Commissioner on but *one* application for benefits." *See* U.S. Br. 33 (emphasis added). In other words, while the two Section 405(g) actions may be distinct, there is no practical reason to treat the second action any differently, for present purposes, than a second appeal in the same administrative proceeding concerning the same application for social security benefits.

in other civil actions," 42 U.S.C. § 405(g) (emphasis added), should not go any further in deciding this case. Nevertheless, contrary to the suggestion of the government (Br. 26-34), policy considerations support, not undermine, the conclusion that a party in Forney's position may not appeal.

After devoting most of its efforts to arguing that claimants in Forney's position should be entitled to appeal, the government switches its tack and argues that the practical consequences of such a ruling would be negligible because virtually no claimant in Forney's position would *want* to appeal. *See* U.S. Br. 26-29. Thus, for example, the government observes that claimants who win sentence-four remands are far more likely to obtain the claimed benefits on remand (60-65% of such claimants do) than they are to secure outright reversal in an appeal (very few do), *id.* 27; U.S. Cert. Resp. 10;[25] and that such claimants are likely to obtain the requested benefits "more quickly through the [remand] proceedings," U.S. Br. 27-28, than through "a time-consuming appeal," U.S. Cert. Resp. 10 (internal quotation marks omitted).[26] These considera-

[25] One of the factors accounting for this success rate is the fact that remand proceedings—quite unlike federal court appeals—not only allow the decisionmaker to reweigh the facts, but typically permit an opportunity for the claimant to present new or additional evidence in support of her claim. *See* U.S. Br. 27. As the government has explained, the opportunity to present such evidence—which Forney herself is "likely" to have—often is of "substantial strategic or practical" value to claimants. U.S. Br. 27.

[26] For example, the appeal in this case was noticed on June 5, 1995 (C.A. E.R. 258) and was not finally disposed of by the Court of Appeals until May 29, 1997 (Pet. App. 41), nearly two years later. By contrast, sentence-four remands are, according to the government, typically processed "within a year." U.S. Br. 28. Given this discrepancy, the *claimant* in *Finklestein* strenuously opposed the Secretary's effort to appeal and, thus, "to inject yet a *sixth* level of routine proceedings into the Social Security process," adding that "[t]he burden imposed by * * * delay during [such] appellate review * * * [would be] unbearable." Resp. Br. in *Sullivan* v. *Finklestein*, No. 89-504, at 47 (emphasis added).

tions, however, cut *in favor of*, not against, requiring claimants in Forney's position to return to the agency to secure their benefits before burdening the courts of appeals with factually intensive but, most commonly, legally meritless appeals. Presumably, that is why the government proclaims that a rule *requiring* claimants in Forney's position to appeal would be "unfair." U.S. Br. 34 n.20.

The government (Br. 29-34) also hypothesizes that claimants in Forney's position normally will forego available appeals because they should not have to worry about the preclusive effect of the district court judgment in their favor in subsequent proceedings. Here again, however, the government has it backwards. Under settled doctrine, a party who foregoes an *available* appeal risks being precluded by the judgment in subsequent proceedings. *See Partmar Corp.* v. *Paramount Pictures Theatres Corp.*, 347 U.S. at 99 & n.6; *supra* at 28. And the prospect of such preclusion of course provides a powerful incentive to appeal. The government recognizes this fact (*see* Br. 29-30) and, to remedy it, urges this Court to exercise its "equitable * * * discretion" and establish a special exception to existing preclusion doctrine, so that claimants in Forney's position will not feel compelled to appeal judgments in their favor. *Id.* 32 (internal quotation marks omitted). It is, however, entirely unnecessary to complicate existing preclusion rules by the creation of such an exception if the Court simply applies the settled principles applicable in other civil actions, and holds that a party in Forney's position may not appeal.

In any event, it is obvious why the government urges the Court to go to such lengths to ensure that claimants in Forney's position do not routinely pursue appeals of sentence-four remands. If they did, it could lead to a significant influx of new appeals in an already overburdened appellate court system. *See* Hon. William H. Rehnquist, *1997 Year-End Report on the Federal Judiciary* 4 (Jan. 1, 1998) ("Since December 1990, * * * the number of cases filed in courts of appeals has grown by 21%

* * *."); *id.* at 11 n.4 (in 1997, "a record level of more than 52,300" appeals were filed, including a 56% increase in "administrative agency appeals"); *see also* Diana G. Culp, *Fixing the Federal Courts*, 76 A.B.A. J. 63, 63 (June 1990) ("Since 1945 * * * the number of appeals [in the federal courts] has risen nearly 15-fold, by 1,355 percent."); *Board of Trustees* v. *Sweeney*, 439 U.S. 24, 26 (1978) (Stevens, J., dissenting) (noting that "circuit judges—more than any other segment of the federal judiciary—are struggling desperately to keep afloat in the flood of federal litigation").

"The Social Security Administration (SSA) hearing system * * * is probably the largest adjudicative agency in the western world." Jerry L. Mashaw *et al., Social Security Hearings and Appeals* xi (1978). Hundreds of thousands of claims for social security benefits are processed by SSA each year, an amount that exceeds the total number of civil and criminal actions closed by the entire federal judicial system each year. *Id.*; SSA, *Annual Statistical Supplement, 1997* 137, Table 2.F9 (Dec. 1997) (605,000 hearing dispositions in 1997 in all SSA cases; 188,737 in disability cases). Thousands of those agency decisions, in turn, are challenged each year in federal district courts across the country pursuant to 42 U.S.C. § 405(g). *See Statistical Supplement, supra*, at 137, Table 2.F10.

In fiscal year 1996, for example, 8,556 new civil actions were filed in federal district court challenging the denial of social security benefits, virtually all of which involved challenges to the denial of disability benefits. *Id.* While precise data on the number of remands issued in such actions apparently does not exist, *see id.*, other SSA reports indicate that remand orders are commonly issued in Section 405(g) actions. *See* Div. of App. Assessment of the Off. of Policy & Procedures, SSA Off. of Hearings & App., *Court Remands: Analysis & Recommendations* 4 (Dec. 1987) (between 1984 and 1989, remands comprised 43-63% of district court dispositions).[27] In other words, the available statistics suggest that each year there are apparently thousands of parties in Forney's position, who have secured a sentence-four remand and, if the government and Forney are correct, are entitled to bring an immediate appeal.

We have been unable to locate statistics on the number of parties in Forney's position who have actually filed such appeals in the past. (The government suggests the number is quite small. *See* U.S. Br. 27 n.16.) But such statistics would be of little moment in any event, since the pertinent question is how many claimants in Forney's position are likely to file appeals if the Supreme Court of the United States issues a decision holding that such parties are entitled to bring an appeal taking another shot (however far-fetched) at outright reversal. Unlike the government, we believe this number could be substantial, especially from the perspective of the already-overburdened courts of appeals that would be forced to process these appeals. Cause for concern is heightened if the Court does not establish the new, "equitable" exception to preclusion principles that the government urges it to create in order to stem the tide of such appeals. Indeed, even the government acknowledges that any ruling that "encourage[s] litigants to seek immediate judicial review of sentence-four remand orders * * * would promote unnecessary appellate litigation." U.S. Br. 34.

From the standpoint of judicial economy, there seems to be little reason to subject the federal courts of appeals to this additional workload. Appeals in social security disability are typically factually intensive, as the briefs filed by the parties below aptly illustrate. At the same time, claimants "face an uphill battle" in the courts of appeals, since, by the time such cases reach the appellate

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[27] This report does not differentiate between sentence-four and sentence-six remands, but, according to the government (Br. 11 n.6), "the vast majority of remands ordered under Section 405(g) are entered pursuant to sentence four."

court, "the Commissioner and the district court [already] have each concluded that the existing administrative record was insufficient to warrant an immediate award of benefits," U.S. Br. 28, and review of such matters is only available under the deferential, substantial-evidence standard. There is good reason to conclude, therefore, that—as Judge Friendly observed in a similar vein—"the likelihood of reversal is too negligible to justify the delay and expense incident to an appeal and the consequent burden on hardpressed appellate courts." *Donlon Indus., Inc.* v. *Forte*, 402 F.2d 935, 937 (2d Cir. 1968). The fact that many, if not most, of these appeals would be rendered "wholly unnecessary" (Pet. App. 11) if claimants were required to complete remand proceedings first provides another—independently compelling—reason to deny the type of appeal filed here.

On the other hand, neither the government nor Forney has offered any compelling practical reason for permitting such appeals to go forward, and we are aware of none. Having secured a Section 405(g) remand order, parties in Forney's position not only are entitled to attorney's fees and expenses, *see Shalala* v. *Schaefer*, 509 U.S. at 303, but stand a 60-65% chance of obtaining the claimed benefits before the agency on remand, compared with very little chance of succeeding in the court of appeals, and are even likely to obtain those benefits "more quickly" by returning to the agency first. *See* U.S. Br. 27; *supra* at 30. There is, moreover, little practical disadvantage to pursuing the remand route first, since, if a claimant does not secure the claimed benefits on remand, she may then return to federal court and challenge the district court rulings in the prior proceeding, as well as the Commissioner's decision to deny benefits on remand. And, if she is successful in doing so, she may obtain attorney's fees and expenses for the additional proceedings on remand.

There is, of course, time and expense associated with litigating a claim for benefits on remand. In similar contexts, however, this Court has made clear that such considerations are secondary to the overriding institutional interest in judicial economy—even when that means requiring an individual to "hazard" a criminal trial with no less than his personal liberty at stake. *Parr* v. *United States*, 351 U.S. at 519; *supra* at 23. *Cf. FTC* v. *Standard Oil Co. of Cal.*, 449 U.S. 232, 244 (1980) ("[T]he expense and annoyance of litigation is part of the social burden of living under government.") (internal quotation marks omitted). Especially when weighed against the countervailing considerations discussed above—not to mention the time and expense involved with prosecuting "uphill battle[s]" in the courts of appeals, U.S. Br. 28—this cost, in itself, does not warrant allowing appeals by parties in Forney's position.

There is a final consideration, which the government astonishingly neglects to mention: requiring parties in Forney's position to return to the agency first accords proper respect to SSA as the instrument of a coordinate branch of government charged by Congress with the responsibility for making social security benefits determinations. As this Court has observed in other contexts, "agencies, not the courts, * * * have primary responsibility for the programs that Congress has charged them to administer," and, thus, "agenc[ies] ought to have an opportunity to correct [their] own mistakes with respect to the programs [they] administer[]" before the federal courts look over their shoulders. *McCarthy* v. *Madigan*, 503 U.S. 140, 144-145 (1992); *accord FTC* v. *Standard Oil Co. of Cal.*, 449 U.S. at 242. Affording SSA the opportunity to correct its mistakes on remand from Section 405(g) judgments setting aside the Commissioner's disability determinations advances this important institutional interest; subjecting SSA to a second round of what may very well be entirely unnecessary federal court review plainly does not.

This is all the more reason to adhere to the settled rules governing the review of judgments in other civil

actions, and to hold that parties in Forney's position may not appeal prior to taking advantage of the remand they have won.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals below should be affirmed.

Respectfully submitted,

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ADDENDUM

42 U.S.C. 405(g) provides:

> [1] Any individual, after any final decision of the Commissioner of Social Security made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Commissioner of Social Security may allow. [2] Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business, within any such judicial district, in the United States District Court for the District of Columbia. [3] As part of the Commissioner's answer the Commissioner of Social Security shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. [4] The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing. [5] The findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the Commissioner of Social Security or a decision is rendered under subsection (b) of this section which is adverse to an individual who was a party to the hearing before the Commissioner of Social Security, because of failure of the claimant or such individual to submit proof in conformity with any regulation prescribed under subsection (a) of this section, the court shall review only the question of conformity with

such regulations and the validity of such regulations. [6] The court may, on motion of the Commissioner of Social Security made for good cause shown before the Commissioner files the Commisssioner's answer, remand the case to the Commissioner of Social Security for further action by the Commissioner of Social Security, and it may at any time order additional evidence to be taken before the Commissioner of Social Security, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding; and the Commissioner of Social Security shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm the Commissioner's findings of fact or the Commissioner's decision or both, and shall file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which the Commissioner's action in modifying or affirming was based. [7] Such additional or modified findings of fact and decision shall be reviewable only to the extent provided for review of the original findings of fact and decision. [8] The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions. [9] Any action instituted in accordance with this subsection shall survive notwithstanding any change in the person occupying the office of Commissioner of Social Security or any vacancy in such office. [(Bracketed numerals added.)]